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Liability of Assignee in Bankruptcy to be Sued in the State Courts.

The bankrupt act has given rise to a multitude of vexed questions growing out of conflicts of jurisdiction between the state and federal courts with reference to the possession of the property of insolvent persons, or property seized as belonging to insolvents; and these are continually presenting themselves in new shapes. We are indebted to our correspondent in Boston, Henry N. Sheldon, Ksq., for the following memorandum of the case of Stephen W. Leighton v. J. A. Harwood *et al.*, recently determined in the supreme judicial court of Massachusetts, in which it is determined that an assignee in bankruptcy, appointed by the federal bankrupt court, is liable to suit in a state court for the tortious taking of property alleged to belong to the bankrupt's estate:

This was an action of replevin. The defendants were assignees in bankruptcy of C. G. Foss, and they seized the replevined property as belonging to the bankrupt's estate. It was proved or admitted at the trial that the defendants took possession of the property by virtue of their assignment in good faith, with reasonable cause to believe it was part of the bankrupt's estate. The defendants contended, first, that they were officers of the federal court and their custody was the custody of the court; that a state court had no jurisdiction and could not take the property from their custody; and, secondly, that under section 14 of the bankrupt act, they were entitled to twenty days' notice before the action could be brought. At the trial before a jury these positions were both overruled by the presiding judge, and a verdict was taken for the plaintiff. The defendant took exceptions which the supreme court has now overruled. The court decide that the assignment is not a precept, and it gave the assignees no color of authority to take property of strangers; that the plaintiff's right of action was not affected by section 14 of the bankrupt act; that the state court has jurisdiction of the action; that the cases relied on by the defendants were mostly cases where property in the hands of a marshal of the United States had been interfered with by a process from the state courts; that his office was different from that of an assignee in bankruptcy and his custody of attached property was of a different character; that the doctrine of these cases should not be extended by analogy; that it is not material that the defendant acted in good faith, and that the bankrupt act did not purport to exempt any person from an action in the state court for a tortious taking of the property of a stranger.

Should Defendants in Criminal Cases be Permitted to Testify?

The recent case of Edward Lange, tried in the United States circuit court at Brooklyn, before Judge BENEDICT, on a charge of stealing government mail bags, calls to mind in a forcible manner the propriety of changing the common law rule of evidence, which prevents the defendant in a criminal prosecution from testifying in his own behalf; and as there is now a bill before congress changing this rule so as to admit such testimony in prosecutions in the federal courts, including courts martial and courts of inquiry, a few observations on the subject may not be inappropriate.

We shall not advert particularly to the facts of the Lange case, further than to say that Mr. Lange was proprietor of an extensive printing establishment, and a gentleman of upright Christian character. The prosecution was commenced at the instance of his discharged coachman, who evidently smarted for revenge against him. This fellow was of course permitted to testify against him; but when Mr. Lange offered to testify and explain the possession of the mail bags and reconcile it with his innocence, the district attorney objected, and he was refused permission to do so. This ruling the Judge was obliged, under the law, to make, although the defendant's testimony would have been admitted in the state courts in New York. (United States v. Hawthorne, 1 Dillon C. C. 422.)

Is this rule of law right? Does it embody the common justice which every citizen has a right to expect in the courts of his country? We cannot avoid expressing a strong conviction that these questions must be answered in the negative. The argument urged in support of the common law rule is that the *interest* of the prisoner in the result of the prosecution is so strong, and his temptation to commit perjury therefore so great, that his testimony, if admitted, will be of no value in elucidating the truth. It is believed that this reason, on examination, will be found to be of no substantial force. We constantly receive and act upon the testimony of interested witnesses in all the most momentous affairs of life; and what reason can be adduced for holding that a mode of enquiry which is approved of as advantageous for the ascertainment of truth everywhere else, should be dangerous when applied to investigations in a court of justice?

Again, the existing rule of the common law produces the most absurd inequalities, not to say the grossest and most palpable injustice. Thus, the defendant is prohibited from testifying on account of his *interest* in the result of the prosecution, while at the same time the public prosecutor, who is likewise interested, and sometimes in an equal degree with the defendant, is heard without objection.

The law indemnifies the latter against the payment of costs unless the prosecution is adjudged frivolous or malicious; and in the latter event, he is liable to pay damages in a civil action. In some cases he is an *informer* who gets a moiety of the fine recovered. It is true that so far as the federal courts are concerned, it has been held by Mr. Justice MILLER that the claimant of property seized for a violation of the internal revenue laws is made by the act of July 2, 1864, a competent witness in his own behalf. Case of 10,000 cigars, 1 Woolw. 123. But cases are no doubt of frequent occurrence, both in the federal and in most of the state courts, where the public prosecutor is permitted to testify although under the impulse of a hope of a large pecuniary reward which will accrue to him in the event of conviction; while the defendant, however irreproachable his previous character may have been, is not allowed to be heard;—an argument that the public is

more interested in the conviction of crime than in the acquittal of accused innocence.

Again, it is now a rule of evidence in the federal courts and in most of the state courts, that parties in *civil suits* shall not be prohibited from testifying in their own behalf. Shall a privilege which is allowed a man for the protection of his property be denied for the protection of his life and liberty?

A volume might be composed of cases illustrating the impolicy and hardship of this exclusionary rule of evidence. Let us take two cases, somewhat similar in their circumstances, one occurring in England, the other in this country. In Rex v. Morrison, 8 Car. & P. 21, a man had been shot, and an officer searching for the person supposed to have done the shooting, came to the defendant and said he was searching for a person named Morrison who was reported to have shot a man. The defendant replied, "*unfortunately*, I am the man." The committing magistrate, who held a preliminary examination of the case, in which the prisoner made a statement of the facts of the transaction, released him on his own recognizance; and afterwards the grand jury ignored a bill of indictment for manslaughter. But he was neverthless tried upon the verdict of the coroner's inquisition, charging him with manslaughter. On the trial he, of course, was not permitted to testify, and his statement made before the committing magistrate, and by him reduced to writing, was not read, because there happened to be no witness present to prove it. The only evidence of guilt adduced against him, then, consisted simply of proof of his admission to the officer that, *unfortunately*, he was the man that shot the deceased; and it was urged in his behalf, that this admission was entirely consistent with the idea that the killing was accidental, and that the jury ought so to find. But the court ruled otherwise. PARK, J., in summing up, said to the jury: "It is argued that no person was present, and therefore it cannot be said that it was not accidental. I do not agree with that view of the case. Because no person was present, is it to be inferred that the killing was accidental, *without any evidence on the part of the prisoner?* I say not. The law of England has said (and I wish to call your attention to this as the rule which has been attempted to be violated) the death of man, homicide, as it is called, if it be shown to have been occasioned by the prisoner, will be *murder* or *manslaughter*, as the circumstances may turn out, unless it be *shown by the prisoner* to have been occasioned by accident." The jury, under these instructions, were obliged to find the prisoner guilty of manslaughter; but, no doubt, conscious that he had been tried on *a part* only of the testimony applicable to his case, strongly recommended him to mercy, and he was sentenced to pay a fine of 40 shillings. Now, the declaration of PARK, J., is unquestionably sound law; but how cruel and absurd is that rule which says that, in such a case, no third person being present, the prisoner shall be adjudged guilty of a felonious homicide unless he show by evidence that it was accidental, when the law at the same time disables him from giving any such evidence.

In the other case, that of Silvus v. The State, 22 Ohio State, 90, the killing took place under similar circumstances. The deceased was stabbed in a vital part, no third person being present. From the imperfect report it would seem that the deceased had no weapon. The defendant was tried upon his own testimony in connection with evidence of the surrounding circumstances, and was found guilty of manslaughter. From the statement of the facts proved, it can scarcely be doubted that the verdict was correct. But what would have been the verdict if his testimony had been excluded? The circumstances showing that he did the killing with a deadly weapon, by a stab in a vital part, the law would have *presumed*—that is to say, the jury would have been obliged to find—that he was guilty of murder in the second degree. (State v. Turner, Wright, Ohio, 20, 28.) In other words, under the Ohio Statute, he was tried upon *all* the evidence of which the case admitted, and the verdict was probably correct; whereas, under the common law rule of evidence he would have been tried on *a part* of the evidence taken in connection with a blind and arbitrary presumption, and the verdict would probably have been wrong.

If other examples are needed to illustrate the injustice and impolicy of the rule which prohibits a person charged with crime from testifying in his own defence, take the common case of a prosecution for receiving stolen goods. The rule in England and in most of the American states is that *recent* possession of the fruits of the larceny is, unexplained, conclusive evidence of guilt *per se*. 2 East P. C. 656; 2 Russ. Cr. 123; 2 Bish. Crim. Proc. §§ 742, 743. The prosecution, then, having shown that the goods were stolen, and that they were soon after found in the defendant's possession, a case against him is made out, and the burden shifts upon him to reconcile that possession with his innocence. Now the defendant is, of all others, the person most likely to be in possession of facts which will enable him to do this, and in many cases he is the only person in possession of such facts. The law says, Show your innocence; but you must not do this yourself; you must find some one else to do it for you, and if you can find no such one, you must suffer the penalty.

Similar cases might be multiplied indefinitely, did space permit. We shall, however, content ourselves with referring to Judge APPLETON'S work on evidence, chapter 7, in which the learned author, with the most searching analysis, picks to pieces, thread by thread, the tissue of fallacies by which the rule of the common law we are here considering is supported, and holds the fragments up to ridicule and scorn.

In several of the states, Massachusetts, New York, Ohio, Kansas and California, defendants in criminal cases are permitted to testify. So they are in Pennsylvania, when the prosecution is for a misdemeanor. It may be added that the tendency of judicial sentiment appears to be in favor of extending this privilege to accused persons. Thus, in Michigan there is a statute permitting the defendant to make a statement not under oath to the jury. It has been ruled by the supreme court of that state that this statement is *evidence* which may go to counterbalance sworn testimony. Durant v. People, 13 Mich. 351, 355; De Foe v. People, 22 Mich. 224, 226; People v. Jones, 24 Mich. 217, 226. See also Gale v. People, 26 Mich. 157. And the same ruling has been made under a similar statute in Florida. Barber v. State, 13 Fla. 675. For the construction of recent statutes permitting defendants to testify in criminal cases, see 1 Whart. Crim. Law, § 782 *a*, 7th edition.

Since writing the foregoing, we learn from the Chicago Legal News, that under the new criminal code which has just

been adopted by the legislature of Illinois, defendants in criminal cases are allowed to testify. The editor of the Legal News thinks the new measure will tend to convict the guilty and acquit the innocent. T.

Mortgages in Georgia—Mortgages with Power of Sale—Powers Collateral and Powers Coupled with an Interest—Effect of Bankruptcy of Mortgagor, and Jurisdiction of Bankrupt Court.

IN RE DANIEL P. HILL, BENJAMIN G. LOCKETT v. DANIEL P. HILL THE BANKRUPT AND HIS ASSIGNEE, EDWARD F. HOGE.

United States District Court, Northern District of Georgia, January 29, 1874.

Before Hon. JOHN ERSKINE, District Judge.

1. **Powers, Collateral or Coupled with an Interest—Expiration of.**—A collateral power, although irrevocable, expires with the life or bankruptcy of the appointor; otherwise in case of a power coupled with an interest.

2. ——. **Nature of Mortgages in Georgia.—Mortgages with Power of Sale.**—In Georgia a mortgage is merely a security for debt, and passes no title, estate or interest to the mortgagee. Therefore a power of sale in a mortgage is not, in Georgia, a power coupled with an interest, but is merely a collateral power.

3. ——. ——. **Execution of Power of Sale—Bankruptcy of Mortgagor.**—It follows that, in Georgia, a power of sale contained in a mortgage cannot be executed after the mortgagor has been adjudged a bankrupt.

4. **Mortgages with Power of Sale—Possession of Mortgagee—Fractions of a Day.**—Courts will regard fractions of a day when it is necessary to ascertain which of two events first happened. Thus, where a power to sell mortgaged premises was made to the mortgagee, and a lease of the mortgaged premises to a third person was made at the same time, which lease was referred to in the power, the court noticed the fact that the lease was executed previously to the power, for the purpose of ascertaining whether the mortgagee had been actually put in possession of the mortgaged premises or not.

5. ——. ——. If a mortgagee acquire possession of real property after the expiration of a lease made by the mortgagor to a third person, and there is no evidence that the property was rented to him by the mortgagor, he will, in Georgia, be a mere tenant at will or at sufferance.

6. ——. **Possession of Mortgagee as Tenant at Sufferance.**—The possession by a mortgagee of the mortgaged premises as tenant at will or at sufferance, is not a possession of such dignity as will, in connection with a power of sale granted to the mortgagee, create a power coupled with an interest.

7. ——. **Execution of Power of Sale where there is a Limit as to Time.**—Where the power granted to a mortgagee to sell the mortgaged premises is limited to a specified time, if the mortgagee fail to execute it within that time, the power is forever gone.

8. ——. **Execution by Mortgagee of Power to Sell—Mortgagee cannot become Purchaser.**—A mortgagee with a power to sell cannot himself become the purchaser, either in severalty, joint tenancy or otherwise. The relations of vendor and vendee cannot thus be united in the same person. Thus, where a mortgage with power of sale was made to an individual, he could not execute the same by selling the mortgaged property to a firm of which he was a member.

9. ——. **Mortgagee with Power to Sell, a Trustee.**—A mortgagee with power to sell is, in Georgia, a trustee for the mortgagor, his heirs, etc., and as such is accountable in equity; and this, although the power may not be regarded as collateral, but as coupled with an interest.

10. ——. ——. **Bankruptcy of Mortgagor—Jurisdiction of Bankrupt Court.**—This relation of trustee is not discharged by the bankruptcy of the mortgagor, but, upon the happening of such event, the trustee can no longer be held to account in a state court. The courts of bankruptcy possess a broad and comprehensive authority, sufficiently extensive to enable them, in such cases, to entertain jurisdiction over the rights of the parties, to take possession of the mortgaged property and administer in accordance with the bankrupt law.

Mr. Ely, for Lockett, the mortgagee and complainant; *Mr. Hoge*, the assignee, *in propria persona*, and *Mr. Culberson* and *Mr. Conley*, for both defendants.

ERSKINE, J.—This suit arises out of a mortgage given by Hill, in January, 1871, to Lockett. The bill states that Hill being indebted to Rust, Johnson & Co. (of which firm Lockett was a member), and in settlement and liquidation thereof, drew his draft on Burt, Johnson & Co., payable to his own order, for $7,451.75, and it was accepted by them and transferred to Lockett; and to secure its payment and in consideration of supplies and money, and to discharge a certain draft in favor of Ketchum & Hartridge, Hill executed the mortgage to Lockett on 1,625 acres of land and certain personal property, and which mortgage contained, among other stipulations, a power to sell the land on non-payment.

Lockett also alleges that he was placed in possession of the property, real and personal, on the 20th of December, 1871, and continued in possession until he conveyed the land under his power, on the 13th of December, 1873, for $4,875, to the firm (of which he was then a member) of Rust, Johnson & Co., and that he is still in possession of the personal property.

He prays an injunction against Hoge, the assignee, to restrain him from selling any of the personal property, or interfering with any of the mortgaged property, real or personal; and asks for a subpœna against both Hill, the *bankrupt*, and Hoge; and the bill prays for "other and further relief."

There is an addendum to the bill—an offer to take the property at a fair valuation to be determined by the court, or to sell the personal property by virtue of his power, and account to the assignee for any surplus; or to surrender the property upon payment of his debt.

The conveyance in mortgage from Hill, the bankrupt, to Lockett, the mortgagee and complainant, was executed on the 16th of January, 1871, by which he conveyed to Lockett a plantation in Dougherty county, in this state, containing sixteen hundred and twenty-five acres, also certain personal property on the land consisting of fourteen mules, all the stock of hogs, cattle, etc., wagons, carts and farming implements, and likewise the crops of corn, cotton and fodder to be raised on the place during the said year 1871; provided, nevertheless, if Hill shall pay on or before the 1st day of October, 1871, a certain draft accepted by one Rust & Son, and all advances so made during the year for provisions, and shall save Lockett harmless on the Ketchum & Hartridge draft, and all costs, expenses and fees, then the deed to be void, else of full force. The mortgage further stipulates that if Hill shall fail to pay the draft accepted by Rust & Son, at the time and in the manner specified, and also the advances for the present year, then Rust & Son or Lockett shall have the right to foreclose said lien or mortgage on the growing crops and other personal property, in accordance with the statutes of this state. As to the real estate, it is further agreed that Lockett shall have the right to foreclose this mortgage upon the same, or to sell said plantation upon the most favorable terms practicable, either at public sale to the highest bidder, or at private sale, and to account to Hill, after paying off said debts, for the balance; and Hill constitutes and appoints Lockett his attorney in fact, ratifying his acts and doings in the premises, provided, nevertheless, that this power of attorney to convey and make titles shall not operate until after the first day of October next, 1871.

On the 20th of December, 1871, Hill and Lockett entered into a written agreement, under seal, reciting that Hill being indebted to Lockett in a large amount, and to secure the debt, as well as for other purposes, he, on the 16th of January, 1871, executed to Lockett a mortgage to certain property, real and personal, and being still indebted to Lockett in the sum of six thousand seven hundred and thirty-three dollars twenty-three cents with interest from the 1st of December, 1871, at the agreed rate of ten per cent. from said 1st of December until paid; and that, by said mortgage, Lockett had the right to sell the land therein conveyed, but the present not being considered a judicious time to make the sale, it is agreed that Lockett shall take possession of said property, real and personal, and shall have the right to rent the plantation and the personal property in terms this day agreed upon between Lockett and one John La Roque, and that the rent shall be applied to the extinguishment of the debt due by Hill to Lockett; and that during the ensuing year (1872) Lockett shall have the right to sell all of the property, both real and personal, mentioned in said mortgage, consisting of the lands mentioned in the mortgage and personal property this day turned over to La Roque, and

apply the proceeds, firstly, to the balance due on the debt above mentioned in this agreement, and secondly, to the payment of the Ketchum & Hartridge draft (provided this draft has to be paid), and Lockett is appointed attorney in fact for Hill, with full power and authority to act as his attorney in fact and to make all needful conveyances.

On the 24th October, 1873, Hill wrote Lockett that as he was unable to pay him, he might take all the stock, etc., on the land ("all of which is mortgaged to you") at a fair valuation, and credit the same on the debts. There is no evidence that this offer was accepted or rejected. Much was said during the argument as to whether Lockett ever took actual possession of the land and personal property. The evidence read is conflicting. It was, however, agreed by the instrument of December 20, 1871, that Lockett "shall take possession of the said property, real and personal, and shall have the right to rent and hire," etc. By a writing dated December 20, 1871, Lockett rented the "plantation of D. P. Hill," and the personal property thereon, for the year 1872, to La Roque for forty bales of cotton, to be raised on the place and delivered to him. One Blake filed an affidavit stating that he rented the plantation from Lockett for 1873, and paid him the rent, and regarded Lockett as the lawful owner and posssesor of said plantation, and held the same as his tenant, and upon delivering the possession to Lockett, he put one White in possession. But he does not positively state that Lockett was at any time in actual possession of the land, and he makes no mention whatever of the personal property. Mr. Ely, solicitor and counsel for Lockett in this cause, swears that he was present on the plantation of D. P. Hill on the 20th December, 1871, and that in his presence Hill delivered the possession of the plantation to Lockett, and all the personal property thereon. The bankrupt, in his answer, read as an affidavit, denies that he ever, at any time, turned over the possession of the plantation and personal property to Lockett, but simply authorized him to exercise a supervisory control over the same, in order to protect and further defendant's interests in the way of making crops. He also denies that Lockett rented out the property for 1872 or 1873, but, on the contrary, he says that he rented out the plantation, stock, etc., etc., to La Roque for forty bales of cotton for the rent; but intending that Lockett should have the rents and profits, he caused La Roque to execute the contract with Lockett instead of with himself. He further says that Lockett never gave him (Hill) leave to rent the place for 1873 to Blake, as his (Lockett's) agent; but that he himself rented it to L. Blake, without obtaining the consent of any one, except that of Blake; but let Lockett collect and retain the rents due by Blake for 1873.

On the 3d of December, 1873, Hill filed his petition in bankruptcy, and was adjudged a bankrupt by Register Black. On the 9th Lockett was, on petition of the bankrupt, restrained from selling the mules, wagons, etc., enumerated in the mortgage; and Edward F. Hoge was appointed assignee of Hill on the 20th; but on the 13th, intermediate the filing the petition in bankruptcy and the appointment of the assignee, Lockett sold the land, in fee, to Rust, Johnson & Co. (the mortgagee himself being the company), for $4,875, by a warranty deed, executed in the name of Hill, the mortgagor and bankrupt; the deed of conveyance is signed and sealed as follows: "D. P. Hill, [L. S.] by B. G. Lockett, attorney in fact." Hill, in his answer, swears that this land cost him $16,225 before the war. On the 2d of January, 1874, Lockett instituted the present suit, and by consent, the court granted an order restraining the assignee from selling the personal property until argument could be had on the prayer for injunction, etc. Lockett, by counsel, insisted that by virtue of the power of sale inserted in the mortgage of January 16, 1871, and in the power of sale in the agreement of December 20, 1871, and by the power of attorney contained in each of these instruments, appointing him attorney in fact to sell, convey and make all needful conveyances, and by the authority given him in the latter instrument to take possession of all the mortgaged property, real and personal, he had a power coupled with an interest, and therefore a perfect right to convey the fee as he had done, and authority to make an absolute sale of the personal property notwithstanding Hill was then a declared bankrupt; and that no part of this property, real or personal, is assets of the bankrupt's estate.

On the part of the assignee it was contended that all said real and personal property is assets of Hill's estate, and that it passed to him by deed of assignment for distribution among the creditors of the bankrupt, under the bankrupt act of 1867 and its amendments.

And for the bankrupt it was urged that he, being the head of a family, is under the first section of the seventh article of the state constitution of 1868, and the state law of the same year (Code, section 2002), entitled to a homestead in said mortgaged land to the value of $2,000 in specie, and exemption in the personal property to the value of $1,000 in specie.

It is a rule too well settled to need the citation of authorities, that a collateral power, although in many instances irrevocable by the principal, expires with his life or bankruptcy, but it is otherwise when the authority or power is coupled with an interest; for in the latter case it is not extinguished by the death or bankruptcy of the appointor; it survives and may, as a general rule, be executed in the name of the person in whom it was placed. Venerable authority on questions of this nature says that if a person clothed with a power hath at the same time an estate in the land, the power is not collateral because it savors of the land. Hardres, 415. And the Supreme Court of the United States, by Chief Justice MARSHALL, in Hunt v. Rousmanier, 8 Wheat. 175, said: "What is meant by the expression 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing."

Does the power now in question answer the definition given in Hardres, or the equally accurate description given by the Supreme Court? Had Lockett, at the time when the power was executed, a vested interest or estate in the mortgaged property? Was the power conferred conjoined with an estate, held by Lockett, in the thing itself? "A mortgage in this state is only a security for a debt, and passes no title" Code, 1954. Avoiding unessential matters as far as may be, and matters collateral to the questions for decision, I will quote from or refer to the construction given to this statute by the state supreme court, as found in the Reports. In Davis v. Anderson, 1 Kelly, 176, WARNER, J., in delivering the opinion of the court, said that "a mortgage in this state is nothing more than a security for the payment of the debt; and the title to the mortgaged property remains in the mortgagor until foreclosure and sale, in a manner pointed out by the statute." * * * * "Under our law the legal title to the mortgaged property remains in the mortgagor until after foreclosure and sale." And the interpretation given by that learned judge has been followed from that day to this. See the Reports, *passim*. In Scott v. v. Warren, 21 Ga. 408, MCDONALD, J., said: "In England and in some of the states of the Union, when the condition is broken, the estate is so absolutely vested in the mortgagee that he may maintain ejectment and recover the premises. This is not the case here. In this state a mortgage in its inception is nothing more than a security for the payment of money, and it so continues to be, and nothing more, after the breach of the condition; therefore, creates a lien only, and not an estate." And this court, in The United States v. The Athens Armory, 35 Georgia, 344, said: "A mortgage in Georgia is only a security for the debt; the title to the property remains in the mortgagor." This is fully settled as a rule

of property by a series of state adjudications, and when such is the case the federal courts adopt the decisions of the state courts.

It has been nearly a century and a half, if my researches are correct, since powers of sale, in conveyances in mortgage, were first known to the courts in England. And notwithstanding their validity has been supported in courts of equity, and they have at least impliedly become a part of the jurisprudence of that country, yet as late as 1825, Lord Chancellor ELDON, in Roberts v. Bozan, mentioned in 1 Pow. on Mortg. 9, 13, characterized them as extraordinary and of a dangerous nature.

The first reported case in our own country, which I have been able to find on this subject, is Bergen v. Bennett, 1 Caines' Cases in Error, 19 This is a bill to redeem on the ground that the power to sell, contained in the conveyance in mortgage, became extinct on the death of the mortgagor. The court for the correction of errors held that the authority to sell was a power coupled with an interest, and dismissed the bill. I will quote portions of the language used by KENT, J., who gave the opinion of the court, and which embody the principal reasons for holding that the power in the mortgage was a power coupled with an interest: "But when power is given to a person who derives under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land. * * The power now in question answers exactly to this definition" (Hardres, 415) "of a power with an interest, because the mortgagee has, at the same time, a vested estate in the land, and it does not answer at all to the definition of a power simply collateral; for that is but a bare authority to a stranger, who has not, and never had, any estate whatever."

Wilson v. Troup, 2 Cowen, 195. This was also a bill to redeem. It was held by the court, as had previously been done in Bergen v. Bennett, and Wilson v. Troup, 7 Johns. C. R. 25, that a power of sale contained in a mortgage is a power with an interest. And the court of errors intimated the opinion that a power of sale inserted in a mortgage was in the nature of a power appendant to the land. A power appendant is where a person has an estate in the land, and the estate to be created by the power is to, or may, take effect in possession during the continuance of the estate to which the power is annexed; as a power to tenant for life, in possession to make leases. Co. Litt. 342 b. n. 298 H. & B. And SUTHERLAND, J., in Wilson v. Troup, 2 Cowen 195, said: "Now, the power of the mortgagee to sell is a power to create or acquire to himself the equitable estate in the land during the continuance of the legal estate conveyed to him by the mortgage."

The validity of the clause of a power of sale inserted in a mortgage has been, as already remarked, established in the courts of chancery at Westminster (Coote on Mortgage, 128 *et seq.*) and also in New York, and indeed in nearly all the states. In New York and in other states the mode of enforcing these power-of-sale-mortgages is in a greater or less degree guarded by statutes, against irregularity and abuse. Such enactments are highly commendable, for it may be borne in mind that the mortgagee holds the antagonistic and anomalous position of creditor and trustee united in himself, and it must often transpire that the time, the place and the manner of selling will present questions of difficulty and importance to the parties. In New York, for example, there must be six months' notice in the public Gazette before the mortgagee can sell under the power of sale. See Jackson v. Lawson, 17 Johns. 300.

With these remarks, I will proceed to ascertain whether, under the statute law of this state, and the construction which it has uniformly received by the state supreme court, a power of sale contained in a conveyance in mortgage, executed in this state, is a power coupled with an interest. Directing attention to the cases which have been cited on the subject of a power of sale in a conveyance in mortgage, it will readily be perceived that the decisions of the courts of England and New York, founded on the legal fact that to create a power combined with an interest, the donee must have at the time of the creation of the power a vested estate in the land or thing. Such power may be classed as an appendancy, and the power must have an estate to conjoin with and nourish it. When this is not the case, the power is simply collateral and ends, at farthest, with the life or bankruptcy of the donor.

In England and in several of the states, including New York (and in the latter state at least when the decisions above noted were made), ejectment may be maintained by the mortgagee against the mortgagor on his failure to pay the money at the time stipulated. Whereas, in Georgia, no ejectment or other possessory action on breach of the condition by the mortgagor has been recognized as a part of its jurisprudence. The rule of evidence is that the plaintiff in ejectment must succeed, if at all, on the strength of his own title, and not on the infirmity of the claim of the defendant. So, too, the claimant, to support his action of ejectment, must be clothed with the legal title to the lands. In Reed v. Shepley, 6 Vermont, 502, it was resolved that in an ejectment a mortgagor cannot dispute the title of the mortgagee. Thus, in England and in New York and other states of the Union, upon the delivery of the ordinary conveyance in mortgage, an estate or interest passes to and vests in the mortgagee, and such estate being then vested in him, it is sufficient, in law, upon which to raise a power coupled with an interest; and the estate or interest in the land or thing being in the mortgagee at the time he is clothed with the authority, the estate supports the power and they stand united.

So far as my information extends, the common law doctrine, even in its modern and modified form; in relation to conveyances in mortgage, has never met the sanction of the supreme court of this state. Here the rights of parties to these securities for debts, from beginning to end, are regulated and enforced solely by the principles of equity; the very language of the statute is the rule in equity. "A mortgage," says the Code, sec. 1954, 'in this state is only a security for a debt and passes no title." As already observed, the state supreme court, in Davis v. Anderson, said that the title remains in the mortgagor until foreclosure and sale in the manner pointed out by the statute. And MCDONALD, J., in Scott v. Warren, said: "Here a mortgage in its inception is nothing more than a security for the payment of the money, and it so continues to be, and nothing more, after the breach of the condition. The mortgage therefore creates a lien only and not an estate; and the mortgagee in relation to the mortgaged property stands on the same footing as any other creditor." And this view of the law of mortgages in Georgia was approved by LUMPKIN, J, in delivering the opinion of the court in Elfe v. Cole, 26 Georgia, 197.

Numerous other cases, containing like views, might be cited; but it is deemed unnecessary to do so. Counsel for complainant read the case of Robenson v. Vason *et al.*, 37 Ga. 66, as affirming and adopting as a rule of decision the doctrine of the courts in Westminster and New York. In Robenson v. Vason *et al.*, the main question before the court was whether an injunction which had been granted at the instance of the mortgagor to restrain an innocent assignee of the notes and mortgage from selling the property under a power of sale, given to the mortgagee, his heirs and assigns, was properly dissolved. WARNER, C. J., for the court, held that it was. The chief justice, in the latter part of his opinion, said: "As a general proposition the power to mortgage would seem to include in it a power to authorize the mortgagee to sell in default of payment. William v. Troup, 7 Johns. 32. In this case there is an express power given by the mortgagor to the mortgagee or his assigns to sell the mortgaged property on default of payment upon giving thirty days' notice." I have perused the extended statement of the case made by the reporter, and have not discovered one word in it, nor in the opinion of

Chief Justice WARNER, which says or indicates, in the remotest manner, that the authority to sell was a power connected with an interest, and I respectfully hazzard the remark that under the facts of that case, as they appear in the report, it could not be a point for decision. The mortgagor was before the court *propria persona*, and not a declared bankrupt. But notwithstanding the power from the mortgagor to the mortgagee and his assigns was not coupled with an interest, yet it may have been, and probably was, given for a valuable consideration, and consequently, in contemplation of law, irrevocable, but would cease with the life or bankruptcy of the mortgagor. Walsh v. Whitcomb, 2 Esp. 565; Hunt v. Rousmanier, *supra*. "These powers are not ordinary powers operating by means of limitation or use, but *trusts* declared on the legal estate in the mortgagee." Hilliard on Mortgages, 138, 3d edition.

I am of opinion that the power of sale contained in the mortgage, or that inserted in the agreement of December 20, 1871, was not in either instance, under the statute laws of this state, or the decisions of the state supreme court, that power which is known in legal language as a "power coupled with an interest."

Adverting to the synopsis of the bill, etc., in a former part of this opinion, in which is embodied the substance of the mortgage of January 16, 1871, and agreement of December 20, 1871, it will be seen that the authority to foreclose, as to the personal property, on default of payment was given to Rust & Son or to Lockett; and the power to foreclose, as to the land, or to sell it if the condition was broken, was given to Lockett.

It will be remembered that the mortgage conferred no power to sell the personal property; that authority was given by the agreement. If the authority inserted in the mortgage was a power combined with an interest, it must have been based upon a vested estate in Lockett. He did not foreclose the mortgage upon either the personal or real property, or sell the land after the first of October, 1871 (and which act a proviso in the mortgage authorized him to do if Hill did not pay the money at the time appointed), or before the 20th of December, 1871, on which day the "agreement" was executed. This instrument says Lockett shall take possession of the land and personal property mentioned in the mortgage and rent the same to La Roque "on terms this day agreed upon between Lockett and La Roque," and it is also stipulated that Lockett "shall have the right during the ensuing year (1872) to sell all of the real and personal property this day turned over to La Roque."

If the power in the mortgage to sell the land after the first of October, should the debts not then be paid, was a power linked with an interest, re-granting it by the agreement of December 20, 1871, was notional and superfluous, unless it had previously become extinct by efflux of time or otherwise, and the language of the agreement does seem to indicate that it had at that period been extinguished. As just mentioned, it is provided in the agreement that Lockett shall take possession of the mortgaged property, real and personal, and rent and hire the same to La Roque, and Lockett is given the right, during the ensuing year, to sell all of said land and personal property.

Courts disregard fractions or divisions of a day unless it be necessary to ascertain which of two events first happened. And I think it is proper to apply the exception here. It is plain, from the language used in the agreement, that Lockett, before the execution of the agreement, had agreed to rent and hire the mortgaged property to La Roque, and that it had been turned over to him—transferred; these were accomplished facts, effected anterior in time to the delivery of the agreement, though done on the same day. The words are not that Lockett is in possession, but that he shall take possession, etc. In the contract of lease for the mortgaged property made between Lockett and La Roque, it is rented for the ensuing year, 1872, as the "plantation of D. P. Hill." La Roque acknowledges himself as the tenant of Lockett, and signs the lease; Lockett does not sign it. Ely, in his affidavit, says that Hill, on the 20th of December, 1871, delivered the possession of the plantation and all the personal property thereon to Lockett. Hill swears that he never did turn over the possession to Lockett. If the possession was turned over to Lockett on that day—and I express no opinion on the weight of the evidence—the conclusion is that it must have been subsequent, in time, to the execution of the agreement, and consequently after the property had been turned over to La Roque, the lessee. The agreement provides that "Lockett shall have the right during the ensuing year" (1872) "to sell all the real and personal property this day turned over to La Roque." And Hill bestows on Lockett full power to act as his attorney, and to make all needful conveyances. No time was specified in the agreement for the termination of the possession; therefore the law of this state construes it to be for a calendar year. Code, sec. 2290. The agreement, as mentioned already, gave him the right during the ensuing year to sell all the real and personal property turned over to La Roque. This power he did not execute during 1872. And, as he must have known the certainty of his own term, he ought to have availed himself of his power to sell the property indicated in the agreement during its continuance; and whether the right to sell within the time named was a naked authority, revocable at the pleasure of the principal, or was a power irrevocable by the grantor, and consequently current until his bankruptcy, or a power coupled with an interest, is here an enquiry of no legal consequence. The right to sell the entire property during the ensuing year was suspended by Lockett beyond the limitation clause in the agreement, and being once suspended by his own voluntary act, it is, in my judgment, gone forever. But as the power of sale was merely cumulative, it would not bar a foreclosure. Turbish v. Sears, 2 Cliff. 454. "If a man grant all his trees to be taken within five years, the grantee cannot take any after the expiration of five years; for this is in the nature of a condition annexed to the grant." Moore, 882.

Lockett alleges that Hill, as his agent, rented the property to Blake for the year 1873. Hill says he rented it to Blake himself, but allowed Lockett to receive the rent, to be applied in discharge of the debt due him. Blake avers that he rented the plantation from Lockett for 1873, paid him the rent and surrendered the place to him, and he put White in possession. Lockett says he has been in possession of all the mortgaged property from the 20th December, 1871, until he sold the land, shortly after the bankruptcy of the mortgagor, and is still (2d January, 1874) in possession of the personal property. Let it be conceded that Lockett was in possession, though there is no evidence in the record that Hill rented him the property for 1873, so then he must have been in as a tenant at will or at sufferance. The possession as a tenant at will, or at sufferance, would not be of that dignity and nature which could be engrafted on a power in a mortgage in fee so as to make it a power coupled with an interest; it would not bring the power within the definition given in Hardres, or by Chief Justice MARSHALL, of a power coupled with an interest.

If the power of sale given to Lockett was what I have ruled it to be, a collateral power, then it became extinct, at farthest, on the bankruptcy of Hill, nine or ten days prior to the sale of the land by Lockett. But if it was really a power united with an interest, then it survived his bankruptcy, and Lockett could (were it not for reasons which will be explained presently) have conveyed the property in his own name, but not, as he adventured to do, in the name of Hill, who was at the time *civiliter mortuus*—at least he was incapable in law to execute a deed of conveyance. And assuming the power conferred to be of the latter kind, still Lockett could not purchase this land himself, either in severalty, joint tenancy, or otherwise; he could not be vendor and vendee; the characters are inconsistent. Michoud *et al.* v. Girod *et al.*, 4 Howard, 502; Griffin v. Marine Company, 52 Ill. 130.

The remaining question which I shall now consider—and it is a

question of importance in this case—springs from the record. Let the fact be yielded that the power granted by Hill, the mortgagor, to Lockett, the mortgagee, was a power connected with an interest, and consequently not revoked by the bankruptcy of Hill, nor shall I presume it to have been lost previously by the laches of Lockett, the donee, in not selling the property within the time limited, could he, by virtue of such power of sale, convey the land to himself or any one else after Hill had been adjudged a bankrupt under the provisions of the bankrupt act of 1867, unless the sale was made by the order and authority of this court? Now, although Lockett may have, by a clause in the mortgage or agreement, received a power coupled with an interest, yet, after all, he would be but a trustee for Hill, the mortgagor, his heirs or assigns; for neither the mortgage, the agreement, nor the power (even if coupled with interest) invested him with an absolute and indefeasible estate in the property which is the subject of this controversy; and as agent or trustee for the mortgagor, his heirs, etc., a court of chancery could compel him to account for the rents and other fruits of the mortgaged property. Did the bankruptcy of Hill discharge or in any manner lessen the responsibility of Lockett as trustee? Surely not. True, when Hill became a bankrupt, Lockett was no longer liable to account directly to him; for the moment he filed his petition in this court under the bankrupt act, all his estate, of every kind and description, in possession or in action, came by the mere operation of the bankrupt law into the possession of this court, and under its immediate control; and no state court, nor person, can interfere with the possession except by permission of this court. *In re* Steadman, 8 N. B. R. 319. It is declared by the first section of the bankrupt act, that the jurisdiction of the United States district courts, acting as courts of bankruptcy, shall extend "to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors." Thus it will be seen that the congress of the United States has conferred on the bankruptcy courts a broad and comprehensive authority, sufficiently extensive for this court to entertain jurisdiction over the respective rights of the parties in and to the property, real and personal, which was mortgaged by Hill to Lockett, and to cause it to be administered in accordance with the bankrupt law.

Hill, the bankrupt, appears on the face of the bill as a party defendant; but whether he is a proper party need not now be enquired into; he appeared and responded to the allegations and charges in the bill.

The prayer for the writ of injunction is refused; and the order previously granted restraining the assignee from selling the personal property is hereby set aside.

ORDERED ACCORDINGLY.

Railway-Aid Bonds—Effect of Railway Consolidation.

GEORGE NUGENT v. THE BOARD OF SUPERVISORS OF PUTNAM COUNTY.

Supreme Court of the United States, No. 620, October Term, 1873.

1. **Railway Consolidation—Bonds—Case in Judgment.**—A county under legislative authority voted to subscribe for stock in a railroad company, to be paid for in its bonds; the county officers agreed to make the subscription, and the company accepted it; negotiable bonds of the company, payable to the company or bearer, were made; but before they were delivered the company *consolidated* with another company in pursuance of a law in force when the subscription was voted, and subsequent to the consolidation the county received certificates of stock in the *new* company, and delivered to the new company bonds payable to the company to which the bonds were voted or to the bearer: *Held*, that the plaintiff, a *bona fide* holder, could recover.

2. **Effect of the Consolidation** on the liability of the subscription for stock considered.

3. **Cases Criticised.**—Marsh v. Fulton County, 10 Wall. 676, and Clearweather v. Meredith, 1 Wall. 25, distinguished.

Mr. Justice STRONG delivered the opinion of the court.

We think the circuit court erred in sustaining the demurrer to the plaintiff's replication. The bonds to which the coupons in suit were attached purport to have been made and issued by the order of the board of supervisors of Putnam county, in payment of the county's subscription to the capital stock of the Kankakee and Illinois River Railroad Company. They are made payable to that company or bearer, and the plaintiff is a *bona fide* holder of the coupons, having paid value for them without notice of any defence. If, then, the bonds are valid obligations, if they were rightfully issued, the right of the plaintiff to a judgment against the county is plain. The material facts relating to their issue, as gathered from the pleadings, may be concisely stated as follows: The Kankakee and Illinois River Railroad Company was a corporation existing in Illinois under a special charter, and it was authorized to construct and maintain a railroad from the eastern line of the state to Bureau Junction. It had liberty to increase its stock to such an amount as might be necessary to complete its road. At the same time the county of Putnam was empowered, by a general law of the state, to subscribe for the stock of the company, and to issue its bonds in payment of its subscription. In attempted exercise of the power thus conferred, the board of supervisors of the county, on the 4th day of June, 1869, ordered an election to be held to determine whether the county should subscribe for stock of the railroad company to the amount of seventy-five thousand dollars, to be paid for with the bonds of the county, provided the railroad should be so located and constructed through, or within one half mile of, the town of Hennepin. The election was held, and it resulted in favor of the subscription. On the 4th day of January, 1870, another election was ordered to determine whether the county would subscribe for twenty-five thousand dollars more of the stock, to be paid in the same manner, and with a similar provision respecting the location of the road. This subscription was also sanctioned by the popular vote. On the 24th day of September, 1869, the railroad company accepted the $75,000 subscription, and on the 27th of October next following, gave notice of the acceptance to the board of supervisors of the county. This notice was put upon record, and on the same day the board of supervisors adopted a resolution that the subscription was thereby made for the building of the railroad, and directed the clerk of the county court to execute and deliver the bonds on behalf of the county. The resolution also declared that the bonds should be issued on the written order of a committee appointed to protect the interests of the county; that they should not be issued until the railroad company had made a *bona fide* contract with responsible parties for all necessary iron for their road, nor until the company should have made a *bona fide* contract with responsible parties for laying the iron and operating the road through the county, as specified in a previous order of the board. On the 15th day of March, 1870, the second subscription for $25,000 was made in a similar manner and with like directions.

That thus the county became, in effect, a subscriber to the capital stock of the railroad company, and liable for the sums designated, admits of no serious question. The fact that no subscription was formally made upon the books of the company is quite immaterial. In The Justices of Clarke County v. The Paris, Kentucky River and Winchester Turnpike Company, 11 B. Monroe, Kentucky Reports, 143, it was ruled that an order of the county court, by which it was said that it subscribed for a specified number of shares of road stock, was binding, the court having authority to make a subscription. In this case there was more. There was not only the resolution declaring the subscription made, but

there was an acceptance by the railroad company and notice of the acceptance. The minds of the parties came together. Both understood that a contract was made, and had nothing subsequently occurred to change their relations, the county could have enforced the delivery of the stock, and the company could have compelled the delivery to itself of the bonds, on performance of the conditions stipulated. So the parties regarded their relations to each other. The bonds were delivered. The committee appointed by the board of supervisors to protect the interests of the county, under whose direction the bonds were ordered to be issued, were satisfied that all the prescribed conditions precedent to their delivery had been complied with, and so they decided. The county accepted the position of a stockholder, received certificates for the stock subscribed, voted as a stockholder, and proceeded to levy a tax to pay the interest falling due on the bonds. Were this all of the case, the validity of the bonds, and of their accompanying coupons, in the hands of a *bona fide* holder for value, would be beyond doubt.

The circuit court, however, was of opinion, and so decided, that the bonds are invalid, because before their delivery the Kankakee and Illinois River Railroad Company had become consolidated with the Plymouth, Kankakee and Pacific Railroad Company, another corporation. The facts of this part of the case, as set forth in the pleadings, are as follows: On the 12th of January, 1870, a company was organized under the laws of Indiana, for the purpose of building a railroad from Plymouth, Indiana, to the east line of the state of Illinois, at some point to be selected in the direction of Momence and Kankakee, with a view to connection with some railroad leading westward. Its corporate name was the Plymouth, Kankakee and Pacific Railroad Company. With this corporation, on the 21st day of October, 1870, the Kankakee and Illinois River Railroad Company became consolidated, taking the name of the former. The consolidation was authorized by the general laws of the two states, and by a section in the special charter of the latter company. No claim is made that it was not legally effected. The result necessarily was that the consolidated company succeeded to all the rights, property and privileges which belonged to each of the two companies out of which it was formed, before their consolidation. It was not until after this had taken place that the county bonds were handed over and sold, and it was certificates of the stock of the consolidated company which the county received.

What, then, was the legal effect of the consolidation? Did it release the county from its prior assumption to take stock in the Kankakee and Illinois River Railroad Company and give its bonds in payment? or did it render unauthorized the subsequent delivery of the bonds, and make them invalid even in the hands of a *bona fide* purchaser? These are the only questions presented by the record that need discussion.

It must be conceded, as a general rule, that a subscriber to the stock of a railroad company is released from obligation to pay his subscription by a fundamental alteration of the charter. The reason of the rule is evident. A subscription is always presumed to have been made in view of the main design of the corporation and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason it is held that such a change exonerates a subscriber from liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain the company from applying the funds of the original organization to any project not contemplated by it. But while this is true as a general rule, it has no applicability to a case like the present. The consolidation of the Kankakee and Illinois River Railroad Company with another company was no departure from its original design. The general statute of the state, approved February 28, 1854, authorized all railroad companies then organized, or thereafter to be organized, to consolidate their property and stock with each other, and with companies out of the state, whenever their lines connect with the lines of such companies out of the state. The act further declared that the consolidated company should have all the powers, franchises and immunities which the consolidating companies respectively had before their consolidation. Nor is this all. The special charter of the Kankakee and Illinois River Railroad Company contained in its 11th section an express grant to the company of authority to unite or consolidate its railroad with any other railroad or railroads then constructed or that might thereafter be constructed within the state, or any other state, which might cross or intersect the same, or be built along the line thereof, upon such terms as might be mutually agreed upon between said company and any other company. It was, therefore, contemplated by the legislature, as it must have been, by all the subscribers to the stock of the company, that precisely what has occurred might occur. Subscribers must be presumed to have known the law of the state, and to have contracted in view of it. When the voters of the county of Putnam sanctioned a county subscription by their vote, and when the board of supervisors, in pursuance of that sanction, resolved to make the subscription, they were informed by the law of the state that a consolidation with another company might be made, that the stock they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowledge and in view of such contingencies they made the contract. The consolidation, therefore, wrought no change in the organization or design of the company to which they subscribed, other than they contemplated at the time as possible and legitimate. It cannot be said that any motive for their subscription has been taken away, or that the consideration for it has failed. Hence the reason of the general rule we have conceded does not exist in this case, and, consequently, the rule is inapplicable.

In a multitude of cases decided in England and in this country it has been determined that a subscriber for the stock of a company is not released from his engagement to take it and pay for it by any alteration of the organization or purposes of the company which, at the time the subscription was made, were authorized either by the general law or by the special charter, and a clear distinction is recognized between the effect of such alterations and the effect of those made under legislation subsequent to the contract of subscription. In The Cork & Youghal Railway Company v. Patterson, 37 Eng. Law & Eq. 398, which was an action to recover a call of one pound per share on one hundred shares subscribed, it appeared that the defendant was one of the subscribers to the agreement for the Cork, Middleton and Youghal Railway Company. That agreement authorized the provisional directors to extend the purposes of the organization, to change the termini of the road, and to amalgamate with other companies. The subscribers' agreement for the Cork and Waterford Railroad Company contained similar provisions. After the defendant's subscription was made the two companies executed a deed of amalgamation, without any other assent of the defendant than his signature to the subscriber's agreement for the first-named company. Upon this state of facts all the judges held that he remained liable on his subscription. Its effect was said by Chief Justice JERVIS to be an authority to the company to tack his subscription to anything else they might see fit, and thus make him a subscriber to that; and therefore, added the judge, by signing the Cork and Youghal he afforded an authority to the directors to apply his signature to the Cork and Waterford, and so make him a subscriber to that. To the same effect are the cases of Nixon v. Brownlow and Nixon v. Green, 3 Hurl. & Norman, 686. The American authorities are equally explicit. They uniformly assert that the subscriber for stock is released from his subscription

by a subsequent alteration of the organization or purposes of the company only when such alteration is both fundamental *and not provided for or contemplated by either the charter itself or the general laws of the state.* In Sparrow v. The Evansville and Crawford Railroad Company, 7 Porter, Ind. 369, where it appeared that after a public act had taken effect authorizing the consolidation of the charters of two railroad companies, the defendant had subscribed for shares in one of them, and a consolidation was afterwards made, he was held liable to the consolidated company for his subscription, and this though the consolidation took place without his knowledge or consent. The same doctrine was asserted in Bish. v. Johnson, 21 Ind. 299. (See also Hanna v. Cincinnati, 20 Ind. 30.) The supreme court of Connecticut recognized the rule in Bishop v. Brainard, 28 Conn. 289, and a subscriber to one company was held to be a debtor to the consolidated company in a case where there was no general authority to consolidate, but the charter of the company was subject to amendment by the legislature, and where the legislature, after the subscription, confirmed the consolidation. (Vide also Schenectady and Saratoga Plank Road Co. v. Thatcher, 1 Kernan, 102; Buffalo and New York City R R. Co. v. Dudley, 4 Kernan, 336; Meadow Dam v. Gray, 30 Maine, 347; Agricultural Branch R. R. Co. v. Winchester, 13 Allen, 32; Moyes v. Spalding, 27 Vt. 420; Pacific R. R. Co. v. Renshaw, 18 Mo. 210; Fry v. Lexington, 2 Metc., Ky. 314; Illinois River R. R. Co. v. Beers, 27 Ill. 189; Terre Haute and Alton R. R. Co. v. Ear, 21 Ill. 292.)

Many other citations are at hand, but these are sufficient. No well-considered cases are in conflict with them. Marsh v. Fulton County, 10 Wall. 676, is altogether a different case. In that it appeared that the people of the county voted in November, 1853, in favor of a subscription for stock in the Mississippi and Wabash Railroad Company, and in April, 1854, the board of supervisors of the county ordered their clerk to make the subscription. It was not, however, then made. Subsequently, in 1857, the legislature made fundamental changes in the organization of the company, dividing it substantially into three companies, with a distinct governing body for each, and with three classes of stockholders. It was after this that the county subscription was made, and made not for the stock of the Mississippi and Wabash Railroad Company, but for the stock of one of the divisions. Necessarily, therefore, we held that there was no authority to make the subscription which was made, that it had not been approved by a popular vote, and hence that the bonds issued in payment for it were invalid. The county had entered into no contract until after the radical changes had been made in the organization of the company. It never assented to such a change, and when the proposed subscription was approved by the popular vote, there was no reason to expect the change afterwards made. There was at that time nothing in the general law of the state, and nothing in the charter, which authorized the company to change its organization, or which looked to its division into several distinct corporations. It needs nothing more to show how unlike that case was to the present.

In the case in hand the county had, under lawful authority, undertaken to subscribe for stock before the consolidation was made, and the undertaking had been accepted. A liability had been incurred, and the business agents of the county, to whom exclusively the law entrusted the management of its affairs, consented to and promoted the consolidation. And the subscription was made in full view of the law that allowed an amalgamation with another company. The contract was made with reference to that law. Nothing has taken place which the county was not bound to anticipate as likely to happen, and to which the people in voting for the subscription, and the board of supervisors in directing it, must not be considered as having consented. What was ruled in Marsh v. Fulton County, therefore, does not touch this case. Nor was there anything decided in Clearwater v. Meredith, 1 Wall. 25, which sustains in any degree the defence set up on behalf of the defendants.

We have, then, in brief, this case: The people of Putnam county, in pursuance of law, voted a county subscription for stock in a railroad company, to be paid for with county bonds. The financial agents of the county agreed to make the subscription, and the company accepted it. The bonds were made payable to the company, or bearer, but before they were delivered, the company became consolidated with another, in pursuance of authority conferred by the law in force when the subscription was voted, and at the instance of the board of supervisors of the county. All the conditions precedent to the delivery of the bonds were complied with to the satisfaction of the county agents, certificates for the stock were received, and the bonds were delivered and sold. The plaintiff is a *bona fide* holder of some of the coupons for value paid. It would, we think, be a reproach to the administration of justice if he cannot enforce the payment of those coupons, and we see no principle of law or equity that stands in the way of his action. He found the bonds and the coupons upon the market, payable to the Kankakee and Illinois River Railroad Company, or bearer. Proposing to buy, he had only to enquire whether the county was, by law, authorized to issue them, and whether their issue had been approved by a popular vote. He was not bound to enquire farther, and had he enquired he would have found full authority for the issue, and if he had also known of the consolidation it would not have affected him.

The judgment of the circuit court is reversed, and the cause is remitted, with instructions to overrule the defendant's demurrer.

Dissenting, Mr. Justice DAVIS and Mr. Justice MILLER.

Railway-Aid Bonds — Funding Bonds — Defences when Sued on by Innocent Holders.

ISAAC W. POLLARD v. THE CITY OF PLEASANT HILL.

United States Circuit Court, Western District of Missouri, November Term, 1873.

Before DILLON and KREKEL, JJ.

1. **Railway-aid Bonds—Defences when Sued on by Innocent Holder.**—An innocent holder of bonds issued by municipal corporations in aid of railroads, is not required to look beyond the authority and recital in the bond to see whether formalities of any kind, embracing the question as to the subscription, have been complied with.

2. ——. ——. **Application of this Principle.**—Thus, where the vote and ordinance under which bonds were issued by a town corporation in aid of a railroad, required that they be issued to a particular road, and the bonds on their face recited that they were issued to such road, it was no defence to a suit by an innocent holder, upon coupons detached from such bonds, that they were in fact issued to another and a different road.

3. ——. ——. **Interest Payable in Gold.**—Nor is it any defence to such a suit that the interest on such bonds is payable in gold coin. A contract specifically made for the payment of interest in gold coin is valid and will be enforced.

4. ——. ——. **Bonds issued to raise Funds to influence Legislation.**—In a suit upon coupons detached from municipal bonds which recite on their face that they are issued to fund the floating debt of the city, if legal authority to fund such debt existed, it is no defence that such bonds were in fact issued to raise funds to improperly influence legislation. The municipal authorities will not be thus permitted to set up their own wrongful acts against innocent holders of commercial securities which they have issued.

Judson and *Barnard*, for plaintiff; *Hall* and *Adams*, for defendant.

DILLON, Circuit Judge.—This action is brought on detached coupons of two classes of bonds, the first on subscription of $15,000 to the Pacific Railroad of Missouri; the second on bonds funding the debt of the city.

Plaintiff claims to be holder for value before maturity.

As to the Pacific Railroad bonds and coupons, the answer sets up that the vote and ordinance authorizing the subscription were to the Pacific Railroad of Missouri in aid of constructing the Pleasant Hill and Lawrence branch thereof, that the subscription was actually made to the Pleasant Hill and Lawrence Branch of

the Pacific Railroad, and the bonds issued in payment thereof delivered to the St. Louis, Lawrence and Denver Railroad; that for not pursuing the authority as cited in subscribing, the bonds and coupons are void. It is admitted by the pleading that the necessary two-thirds vote to authorize the taking of stock was had. The bonds on their face recite that they were issued to the Pacific Railroad. An innocent holder is not required to look beyond the authority and recital in the bond to see whether formalities of any kind, embracing the question as to the subscription, have been complied with. This has been the uniform decision of the supreme court of Missouri, from the case of Flagg v. The City of Palmyra, 33 Mo. 440, to its last unreported utterances in the Clark county case. Nor has the federal judiciary been wanting in its steadfast adherence to this doctrine. As late as 15 Wallace, Grand Chute v. Winegar, 355, it has been re-asserted, and former cases affirmed.

As to the defence that the bonds are payable in legal tender notes, and that no authority exists to contract for gold coin in payment of interest, it is only necessary to refer to the case of Triblecock v. Wilson and Wife, 12 Wallace, 687, to find the law as settled by the supreme court of the United States. It is there held that a contract may be made for gold coin or specie, and that such contract cannot be satisfied by payment in legal tender notes. That a contract to pay bonds in legal tender notes and the interest thereon in gold coin can be made, it is apprehended will not be seriously questioned. It is a matter of contract purely, and when its conditions sufficiently appear, the court will enforce it. In this case the bonds call for six per cent. interest, payable in gold coin, and the coupons conform to the bonds. No objections are perceived why the contract thus specifically made for gold coin should not be valid and enforced.

The demurrer to the second, third and fourth counts of the answer will be sustained.

The second class of coupons sued on are on funding bonds, and the petition as to them alleges that they were issued in pursuance to an act of the general assembly of Missouri authorizing the funding of the floating debt of the city; that the bonds issued; that plaintiff became a holder for value before maturity, and that the coupons were not paid on presentation.

The answers sets up that the bonds were not issued in payment of outstanding warrants, or in satisfaction of liabilities of the city; that they were issued to raise funds to improperly influence legislation, quoting an ordinance of the city, from which it would appear that such was the case. However much we may deprecate that any people should thus expose themselves on their own record, and swift as this court would be to visit upon the heads of those who would contaminate the fountain of legislation (if a proper case and parties were before the court), it would be but aiding and abetting their wrongful acts to allow them to come and set them up in their own defence against innocent holders of the commercial securities they issued. It is admitted that legal authority to fund the floating debt of the city existed, and that the bonds on their face purported to be issued under and by virtue of it. This binds the city. The use made of the proceeds of the bonds cannot affect holders for value.

The demurrer as to second and third count of answer, as to the second class, the funding bonds will be sustained.

JUDGMENT ACCORDINGLY.

The Bar Association of St. Louis.

The members of the legal profession in St. Louis have organized an association with the above title, similar in its character and in most of the provisions of its constitution to the bar association of New York City, which has succeeded in purifying the professional and judicial atmosphere of that city in a marked degree. It is established "to maintain the honor and dignity of the profession of the law; to cultivate social intercourse among its members, and for the promotion of legal science and the administration of justice." At the meeting which took place on Monday evening, a constitution and by-laws were adopted, the important features of which are that members of the bar in good standing, residing or practicing in the city of St. Louis, may be active members; members of the profession residing elsewhere in Missouri may be members with all privileges except that of voting. Judges are likewise honorary members, and upon the accession of any member to the bench he ceases to be an active, and becomes an honorary member. The initiation and annual fees are fixed for the present at the low sum of ten dollars each, subject to be increased or diminished as the needs of the association may require. An adjourned meeting of the association will be held on Monday, the 6th prox., at which time the officers of the association will be elected.

Properly conducted, this movement may result in great good. That the the legal profession in the United States is greatly in need of the beneficial influence of such agencies cannot be denied. Under the influence of the law societies of London the legal profession in England has maintained a high standing, and has constantly deserved and received the confidence of the government and the people. The same cannot be said of the profession in this country. With us there are no effective means in existence of preventing the entrance of incompetent and improper persons into the ranks of the profession, or of securing their expulsion when they have shown themselves unfit to remain in it. It results that in the United States the legal profession is overrun with its multitude of pettifoggers and shysters, the same as the medical profession is overrun with its quacks. In England to be a barrister is to possess a title of honor and a passport to good society everywhere. To be an attorney and counsellor at law in this country is to be something or nothing, precisely according to the use which the possessor of these titles makes of the privileges of the bar. Indeed, in some instances our profession seems to have reached such a low standard and to have degenerated so thoroughly into a trade, that the name of lawyer has become almost a reproach. To remedy these evils should be, it occurs to us, the principal office of a bar association. If this association keeps the limited objects for which it is created steadily in view, it cannot fail to accomplish great good. If it steps outside of that limited circle and attempts to interfere with the general policy of legislation, or with other things which do not directly concern the legal profession as a profession, it will soon discover that it has outlived its usefulness.

Notes of Recent Decisions of the Supreme Court of Missouri.

[Through the courtesy of W. J. Gilbert, Esq., publisher of the Missouri Reports, we are permitted to make the following abstracts from proof sheets of Volume 54. The cases were decided at the October term, 1873, at Saint Louis.]

Evidence—Admissions—Hearsay.—In a suit brought on the parol promise of the defendant to pay for stock sold to A., although one of the plaintiffs testified that he knew nothing about the contract with the defendant, yet in cross-examination it would be proper to show by him that on a former occasion he had testified that it was his understanding that A. had purchased the stock, and that B. had become his surety. Such testimony was competent as an admission on the part of the plaintiff. Glenn v. Lehner, vol. 54, p. 45.

Statute of Frauds—Original and Collateral Liability.—The question whether a verbal contract comes within the statute of frauds or not, depends wholly on the agreement. If a party agrees to be originally bound, the contract need not be in writing; but if his agreement is collateral to that of the principal contractor, or is that of a guarantee or surety for another, the agreement must be in writing. It is immaterial in such case whether the promise was prior to the passing or delivery of the consideration, or afterwards; in either case the contract must be in writing, and in the latter, must have a new consideration to uphold it. Ib.

Social Evil Ordinance of St. Louis—General Law Repealed by Municipal Charter.—The case of The State v. Kate Clarke, vol. 54, p. 1, has been published in several of the legal journals, and is familiar to the profession in Missouri. In 1870 a charter was granted to the city of Saint Louis, giving the city council power "by ordinance not inconsistent with any law of the state * * to regulate bawdy houses." In pursuance of the power thus granted an ordinance was passed providing for the compulsory registration of prostitutes and houses of prostitution, and for the physical examination of the inmates of such houses by medical officers at stated periods

also compelling the payment of fees for such examinations, which fees went to the establishing of a hospital for the curing of diseased inmates of such houses, who on being discovered to be diseased were sent compulsorily to such hospital and compelled there to remain until cured, when they were set at liberty. The city ordinance thus "regulated" houses of prostitution and gave them a permissive existence, whereas the law of the state punishes prostitution as a crime. The defendant kept a house of prostitution in Saint Louis, and was indicted therefor in the state court and convicted under the state law. The defendant appealed, and urged that the grant of power in the charter and the exercise thereof by the city council repealed, *pro tanto*, the state law, so that she could not be prosecuted and convicted thereunder; and so the supreme court in effect held. The judgment of conviction was, therefore, reversed. NAPTON, ADAMS and WAGNER, JJ., concurring; VORIES and SHERWOOD, JJ., dissenting.

Railway Aid Bonds—Defences in Hands of bona fide Holders.—Smith *et al.* v. Clarke County, vol. 54, p. 58. [This case has been published in this paper, *ante*, p. 5.]

Practice before Justices of the Peace—Judgment—Execution—Motion to Quash, etc.—Caldwell v. Fea, vol. 54, p. 55. The entry on a justice's docket showed suit brought against Fea, Brother & Turnbull, and judgment against defendants "as a firm, or against Joseph Fea and William Turnbull, as the summons was served on them personally. The execution issued under it recited a judgment and ordered levy against the three defendants. *Held*, that although the judgment bound only the two defendants named, yet under the statute (2 W. S. 839, § 15) the execution should not be quashed, but should be amended so as to conform its recitals to the law, and should be directed against the defendants who had been personally served.

Contracts by Infants—Disaffirmance—Ratification.—In Baker v. Kennett, vol. 54, p. 82, an infant who had taken a deed of land and given his note for the purchase money, made an attempt to disaffirm the contract before his majority, and again within a few days thereafter, and upon the refusal of the vendor to agree thereto, offered to give him $2,000, together with the improvements erected on the land, by way of compromise; and abandoned the premises and left them to be occupied by the vendor when he saw fit. *Held*, that the disaffirmance was sufficiently speedy and unequivocal to avoid the contract. The court say in substance that to constitute a ratification of an infant's contract, a mere acknowledgment that the debt existed, or that the contract was made, is not sufficient. There need not be a precise and formal promise, but there must be a direct and express confirmation and a substantial promise to pay the debt or fulfill the contract. And the promise must be made with a knowledge of the facts, and with a deliberate purpose of assuming the liability from which the party knows that he is discharged.

———. ———. **Liability of Surety on Infant's Note.**—The same case decides that where an infant gives his note for land purchased, and on his majority disaffirms the contract, the sureties on the note are not liable.

Supreme Court of Missouri—Decisions this Week.

State v. Alexander. Appeal from St. Louis criminal court. Affirmed in part and reversed in part.

Baldwin v. Chouteau Insurance Company. Appeal from general term of St. Louis circuit court. Judgment of general term affirmed, and cause remanded.

Walser v. Theis. Appeal from St Louis circuit court Affirmed.

State v. Gibbs. Appeal from St. Louis court of criminal correction. Reversed and remanded.

Bartholow v. Campbell. Appeal from St. Louis circuit court. Affirmed.

State v. Crowner *et al.* Appeal from St. Louis court of criminal correction. Reversed and remanded.

Missouri Loan Bank v. Filley. Appeal from St. Louis circuit court. Affirmed.

State *ex rel.* Attorney Genl. v. Townley. Original proceeding by *quo warranto*. Judgment of ouster.

State v. Fred Miller. Appeal from St. Louis court of criminal correction. Affirmed on an inspection of the record.

Myers v. Van Wagoner. Appeal from St. Louis circuit court. Affirmed.

Barry v. Otto *et al.* Appeal from St. Louis circuit court. Affirmed.

Eggeman v. Henschen. Appeal from St. Louis circuit court. Affirmed.

Kronenberger v. Buiz. Appeal from St. Louis circuit court. Affirmed.

We give below abstracts of the opinions so far as the space at our disposal this week will permit, and shall continue the same next week and thereafter, so as to give complete abstracts of all cases decided at this term.

Burglary in First and Second Degree.—State v. George Alexander. In this case the defendant was tried upon an indictment for burglary, which charged that he "with force and arms, about the hour of one of the clock in the night, * * * the dwelling-house of one Clemens Harig, * * * in which there was at the time a human being, feloniously and burglariously did forcibly break and enter, with the intent the goods and chattels in the said dwelling-house * * * to steal, take and carry away," etc. The proof corresponded with the allegations. Under the instructions of the court below the defendant was convicted of burglary *in the second degree*, and of larceny. It was here urged that the judgment was erroneous, since the indictment was for burglary in the *first degree*, and the evidence all tended to establish that offence and none other. The court held that the indictment is applicable alone to the tenth section of the statute (1 Wagn. Stat. p. 454), which defines burglary in the first degree, and not to the eleventh section, which defines burglary in the second degree. The judgment convicting the defendant of burglary in the second degree is therefore reversed, but the judgment convicting him of larceny is affirmed. WAGNER, J., delivered the opinion. The other judges concurred, except SHERWOOD, J., who was absent.

Malicious Prosecution in Suing Out Attachment—Allegations and Proof—Measure of Damages.—Peter F. Walser v. Frederick Theis. This was an action for damages for maliciously suing out an attachment against the plaintiff, causing the same to be levied on his goods, and thereby breaking up his business.

The court hold—1. That it is not necessary in this kind of action that it should appear, from the pleadings or proof, that the defendant participated in the execution of the attachment process; overruling on this point Drake on Attachments, § 730, and Marshall v. Betner, 17 Ala. 832. The court say: "We are not willing to concede that it is necessary to the maintenance of the action that the defendant should in person deliver the writ to the officer, or be present and point out the property and tell him what to do. It is the duty of the court to deliver the process to its executive officer, and it is the duty of that officer to levy the attachment writs on whatever property may be necessary to satisfy the same. The plaintiff in the suit sets the whole proceeding in motion by making out the affidavit, and if he does the same maliciously, vexatiously and without probable cause, and injury results from his unlawful and wrongful act, he is liable and must respond in damages."

2. The jury fixed the plaintiff's damages at $800, and of this the plaintiff remitted $350. This was not such an assessment of damages as the supreme court will disturb. The business of the defendant (who kept a boarding-house) was injured by the attachment, and he was forced to sell out his establishment at great loss.

The court say: "The rules as to damages applicable to other cases of malicious prosecution apply to actions for malicious attachment." The court then state the rule in the language of Dr. Greenleaf (2 Greenl. Ev. § 456) and quote approvingly Drake on Attachments, § 745.

The judgment below is affirmed. WAGNER, J., delivered the opinion. The other judges concurring, except SHERWOOD, J., who was absent.

Assault and Battery.—The State v. Fred Miller. No bill of exceptions and no assignment of errors, the judgment of conviction in this case is affirmed upon an examination of the record. ADAMS, J., delivering the opinion. The other judges concurring, except SHERWOOD, J., absent.

Trade-Marks—The Missouri Statute Expounded.—The State v. John S. Gibbs. This was a criminal information in the Saint Louis court of criminal correction for counterfeiting the trade-mark of Lea & Perrin, of London, England, manufacturers of Lea & Perrin's Worcestershire Sauce, and for vending a spurious article thereunder. The opinion involves an exposition of the Missouri Statute of 1870 on the subject of trade-marks (2 Wagn. Stat., 2d ed., p. 1330). The questions ruled arise on the defendant's motion to dismiss the information for the following reasons: 1. Because the complaint did not charge upon the defendant the violation of any statute known to the laws of the state of Missouri. 2. Because the law under which the defendant was prosecuted was not intended to, nor did it protect merchants or manufacturers doing business in any other place than the state of Missouri. 3. Because the law on which the complaint was based was for the protection of merchants and manufacturers doing business in this state. These objections (the substantial one being embraced in the two last propositions, namely, that the statute was intended to protect domestic manufacturers, and does not extend to the protection of foreign manufacturers) the court overrule.

The court say: "A reading of the act will show that it is comprehensive and general in its character. There is not a word or an intimation given that it was intended to apply only to citizens of this state. Indeed, to give it such a construction would, I apprehend, defeat its principal object and expose our people to all the impositions and deceptions against which the law was intended to guard them. There is a well-known right of property in a trade-

mark which the law will protect, and which it was not the intention of the statute to abridge. The citizens of foreign states will be protected in their rights of property in trade-marks in our courts the same as our own citizens. (Taylor v. Carpenter, 11 Paige, 292; S. C., 2 W. & M. 1.)

"But aside from this, the statute had another important object in view, which was intended directly to benefit our own citizens and shield them against counterfeiters and impostors. Many articles manufactured by certain persons, firms and corporations, have attained a high reputation and are of great excellence, and those articles are sold with peculiar marks, brands or wrappers, or other devices which have been adopted to show by whom they were made. These trade-marks are valuable to the persons who have a proprietary interest in them, and to the people who buy and use the articles, because they are a guarantee of their genuineness. But if by fraudulent means other persons are permitted to counterfeit and forge and simulate these trade-marks and attach them to inferior or indifferent articles, the community is imposed on and cheated. It was to prevent this that the law was enacted. And in its provisions it makes no distinction as to where the original manufacturer resides. It applies to all alike, and was designed to protect our people against gross deception and imposition, regardless of the place where the genuine articles were made."

Judgment reversed. WAGNER, J., delivered the opinion. All the judges concurring, except SHERWOOD, J., who was absent.

Promissory Note—Suit against Endorser—Composition with Maker a Defence.—Hermann Eggeman v. C. H. Henschen. This was an action against the payee and endorser of an ordinary promissory note drawn by Henschen, Krite & Co., in favor of C. H. Henschen, the defendant in this suit, and by him endorsed to the plaintiff. The defence is that the note before maturity had been satisfied by Henschen, Krite & Co., and the satisfaction accepted by the plaintiff, and that this released the defendant, the endorser. This composition deed was passed upon in Diermeyer v. Hackman, 52 Mo. 282, where it was held to be a release by the creditors of their debts. The defence here set up is sustained, the court holding in accordance with Story Prom. Notes, § 423, that the release of the makers by the holder released also the endorser. ADAMS, J., delivered the opinion. The other judges concurring.

Book Notices.

THE AMERICAN REPORTS: Containing all decisions of general interest decided in the courts of last resort of the several states, with notes and references. By ISAAC GRANT THOMPSON. Vol. 9. Containing all cases of any general importance in the following Reports: 1 Colorado; 37 and 38 Conn.; 43 and 44 Georgia; 35 Ind.; 107 Mass.; 23 Mich.; 27, 28 and 29 Wis. Albany: John D. Parsons, Jr., Publisher. 1873.

We gladly avail ourselves of this occasion briefly to speak concerning the series of Reports of which the volume above entitled is the last one which has yet made its appearance. The number of reports is so great and is being added to so rapidly that a complete set of even the American Reports is beyond the reach of the body of the profession. The time, however, has not yet arrived, and probably is not very near at hand, when the lawyer can dispense with reports. If he attempts it, his adversary who has recourse to them is likely to obtain thereby an advantage. But the problem remains, how is it practicable for the lawyer to overcome the difficulties which grow out of the publication each year of so many volumes of reports? Fifty or more are issued annually in this country alone. On the bench of the highest courts of many of the states are judges of great and varied learning, large experience and wise judgment, and this has been so from the beginning. Parsons the elder, Parker, Shaw, Redfield, Kent, Denio, Tilghman, Gibson, Hitchcock, Blackford, Breese, Dixon, Cooley and many other names familiar to American lawyers, will at once occur to the reader.

From causes which it has been found impossible to remove, the practice is to include in the official reports substantially *all* the cases determined by the several courts of last resort. These reports are published primarily for the use of the bar and courts of the particular state, and hence include many cases relating to local practice and which have no extra-territorial value. Besides, it is largely true that the value of an opinion depends very much upon the judge who prepares it; and whoever has had occasion to examine critically the opinions which are found in the fifty volumes of reports issued here each year has not failed to discover that many of them have been hastily written and not well considered.

Now, the object of the series known as the American Reports is to give, in about three volumes each year, all the cases of general value decided in the courts of last resort of the several states, omitting cases relating to practice, to constructions of statutes peculiar to the particular state, and those of merely local interest. In this way twelve or more volumes of state reports can be put in one of the present series.

The value of reports upon this plan depends almost wholly upon the selection of the cases to be published, and the manner in which the work of the editor is performed. None but an accomplished and experienced lawyer can do this work as it ought to be done; and we congratulate the profession that it has been undertaken by one so eminently fitted as Mr. Isaac Grant Thompson. His learning and ability as a law writer are known wherever one of the very best Law Journals in the world is read, and his tastes, talents and studies peculiarly qualify him to edit these reports. His notes to the cases, which are often full and exhaustive, are, in many instances, worth more to the practitioner than the principal case.

We warmly recommend this series of reports as deserving the favor of the profession. Its general usefulness will be much increased by a Digest when the number of volumes shall have somewhat increased.

Legal News and Notes.

—JUDGE PRATT, of the supreme court of New York at Brooklyn, has granted a peremptory mandamus compelling the coroners to deliver the bodies of paupers to the medical faculty of the Long Island College Hospital Association.

—TWEED has just been defeated in a legal endeavor to change his abode in the penitentiary on Blackwell's Island for the more convenient Ludlow street jail. Judge BRADY has overruled this application of his counsel, and holds that the terms of his sentence warrant his confinement in the penitentiary.

—THE new supreme court of Texas, after an examination of the question, have unanimously decided that Mr. De Normandie, appointed clerk of that court by military authority in 1869, and re-appointed by the late bench, December 8, 1873, is entitled to retain his office under the present bench.

—LOUIS JACOB, a laundryman, has obtained a verdict of $500 damages in the superior court of New York city, against Drs. Lalanne and Miller, for false imprisonment in sending him to the insane asylum at Blackwell's Island. Mr. Jacob was at the asylum five days, when the physician in charge examined him, pronounced him sane and ordered his discharge. He thus gets $100 a day for the unlawful detention.

—THE Supreme Court of the United States has just pronounced a decision in the case of Bartemeyer v. The State of Iowa—a case in which a liquor dealer, indicted under the recent Iowa law for the suppression of intemperance, sought the protection of the 14th amendment. The court rule against him, but chiefly on the ground that it was but a moot case, made up to obtain the opinion of the court, when the facts would not warrant a review in this tribunal. Mr. Justice MILLER delivered the opinion.

—THE following important rule, substituted for rule 39 of the United States district court for the eastern district of Missouri, has just been promulgated—Judge TREAT holding that the change becomes necessary under the provisions of the act of Congress of May 9, 1872.

"In all suits had in law pending in this court, depositions shall be taken in conformity with the provisions of section 30 of the act of September 24, 1789 (1 United States statutes, 88), section 3 of the act of February 20, 1812 (2 United States statutes, 682), and sections 1 and 2 of the act of July 24, 1827 (4 United States statutes, 197), as modified by the act of May 9, 1872 (17 United States statutes, 89). Commissions to take testimony in such causes may be issued in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party seeking the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issue of the commission, and if no cross interrogatories are filed at the expiration of the time, the commissioner may issue *ex parte*. In all cases the commissioner or commissioners may be named by the parties jointly or by the court, or by the judge thereof, or by the clerk. If the parties shall agree, the testimony may be taken on the terms agreed, upon oral interrogatories by the parties, or their attorneys or agents, without filing any written interrogatories, and all depositions, on being filed, shall be opened by the clerk at the instance of either party, and be subject to the inspection of the respective parties or attorneys."